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In the Supreme Court of the United States

OCTOBER TERM, 1970

ESTATE OF GLORIA A. LION, Deceased, MORTON E. ROME and GEORGE L. CLARKE, Executors,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1703

ESTATE OF GLORIA A. LION, Deceased, MORTON E. ROME and GEORGE L. CLARKE, Executors,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINIONS BELOW

The opinion of the Tax Court (Pet. App. 11a-20a) is reported at 52 T.C. 601. The opinion of the court of appeals (Pet. App. 1a-11a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1971. The petition for a writ of

certiorari was filed on May 13, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the petitioner estate was entitled to the estate tax credit allowed by Section 2013 of the Internal Revenue Code with regard to previously taxed property, where a life estate bequeathed to decedent by her husband, who died simultaneously with her, had no value.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Section 2013 of the Internal Revenue Code of 1954, and Section 20.2013-4 of the Treasury Regulations on Estate Tax (1954 Code) are set forth in the Appendix, *infra*, pp. 7-8.

STATEMENT

On May 12, 1963, Gloria A. Lion, then 45 years old, and her husband, Albert, were killed, near Cairo, United Arab Republic, in an airplane crash. The circumstances were such that there was insufficient proof to determine the chronology of their deaths. (Pet. App. 13a.)

Albert's will stated a presumption of his wife's survivorship in the event of simultaneous deaths, or in the event of deaths under circumstances making proof of the chronology of their deaths insufficient. His will created both a marital trust and a residuary trust. The residuary trust was for the benefit of Gloria for life, and on her death in trust for the benefit of the couple's two children. (Pet. App. 13a-15a.)

Section 2013 of the Internal Revenue Code, Appendix, *infra*, p. 7, provides for a credit against estate tax of all or a portion of the estate tax paid with respect to property transferred to the decedent within 10 years before the decedent's death. In reliance on this provision, petitioners claimed a credit based on and measured by the life estate created under the residuary trust in Albert's will, and allegedly transferred to Gloria. For purposes of computing the estate tax paid by Albert's estate with respect to Gloria's life estate, petitioners used the present value factor of life expectancy for a woman 45 years old, and multiplied this factor by the value of the residuary trust at the time of Albert's death. The Commissioner disallowed the credit, and petitioners sought a redetermination in the Tax Court. (Pet. App. 15a.)

That court reasoned that in order to be entitled to the Section 2013 credit, petitioners were required to show the value, if any, of Gloria's life estate as of the time of Albert's death. Taking into account the special circumstances at that time, *i.e.*, the death or imminent death of Gloria, the court found that Gloria's life estate had no value. It accordingly held that even if there had been a transfer of the life estate from Albert to Gloria, no credit would be available under Section 2013. (Pet. App. 18a-20a.) The court of appeals affirmed (Pet. App. 1a-11a).

ARGUMENT

The decision below is correct. There is no conflict or any other basis for further review.

1. It is true, as a general principle of valuation, that life interests should be valued on the basis of actuarial expectancy rather than by reference to actual subsequent events. But, contrary to petitioners' claim (Pet. 7, 13-14), there is no requirement under Section 20.2013-4 of the Treasury Regulations on Estate Tax, Appendix, *infra*, pp. 7-8, that such tables must be used when, at the time of valuation, there are compelling facts which indicate a value other than actuarial value. Where the facts conclusively show that a life tenant cannot or will not live out his or her actuarial life, the courts have held that actuarial tables need not be used, and that value may be determined by reference to the actual facts at the critical time. See *Estate of Hoelzel* v. *Commissioner*, 28 T.C. 384; *Estate of Butler* v. *Commissioner*, 18 T.C. 914; *Huntington National Bank* v. *Commissioner*, 13 T.C. 760; *Estate of Jennings* v. *Commissioner*, 10 T.C. 323; see also Rev. Rul. 66-307, 1966-2 Cum. Bull. 429; *Commissioner* v. *Sternberger*, 348 U.S. 187.

Here, the actual facts make it apparent that at the time of Albert's death—the event causing the life estate to come into being—the decedent either was already dead, or was about to die momentarily. The property interest in question therefore had no value at the critical time, or at best an incalculable *de minimus* value. To allow a credit based on the life expectancy of a 45-year old woman would, under these circumstances, "prefer fiction to reality and * * * defeat the clear purpose" of Section 2013. See *Commissioner* v. *Estate of Shively*, 276 F. 2d 372, 375 (C.A. 2).

2. There is no merit to petitioners' claim (Pet. 10-12) that the court of appeals failed to give effect to the legislative history of Section 2013, relating to the meaning of the term "transfer of property." The court did not rest its holding on the presence or absence of a transfer, but rather on the fact that, whether or not there was a transfer, the life estate had no value. The court's remarks regarding the transfer question were not essential to its holding.

3. The decision below is not inconsistent with *Ithaca Trust Co.* v. *United States*, 279 U. S. 151; *United States* v. *Provident Trust Co.*, 291 U. S. 272; *Commissioner* v. *Sternberger*, 348 U. S. 187; and *Bankers Trust Co.* v. *Higgins*, 136 F. 2d 477 (C.A. 2), upon which petitioners rely (Pet. 8-10). These cases all arise on facts wholly different from those here. Moreover, none of them suggests that actuarial tables must be used where, as here, there is absolute certainty that their use would violate reason and fact.[1] See Pet. App. 7a-9a.

Nor is there a conflict with cases involving the valuation of life insurance policies owned by decedents who were killed in common accidents, as petitioners contend (Pet. 12-15). See *Estate of Wien* v. *Commissioner*, No. 27828 (C.A. 5), decided April 12, 1971; *Estate of Meltzer* v. *Commissioner*, No. 15,015 (C.A. 4), decided March 12, 1971; *Old Kent Bank*

[1] There is similarly no basis for the contention (Pet. 7, 14) that the court below should have allowed the credit because of statistics of survival in airliner accidents. Resort to such general statistics is unnecessary in view of the actual fact of the life tenant's death.

and Trust Co. v. *United States*, 430 F. 2d 392 (C.A. 6); *Estate of Chown* v. *Commissioner*, 428 F. 2d 1395 (C.A. 9). As the Fourth Circuit recognized in its own *Meltzer* case, *supra*, slip. op., pp. 4-6, and in its opinion here (Pet. App. 9a-10a), the valuation of life insurance policies is governed by Regulations 20.2031-8(a)(1) and (2). Those Regulations provide that value is to be determined by reference to sales by the insurer of comparable contracts, and require a valuation based on interpolated reserves except where the insurance contract itself is of an unusual nature. In contrast to this "relatively inflexible valuation method" (*Meltzer*, *supra*, slip op., p. 6), Regulations 20.2013-4, applicable in the instant case, provide merely that the value of a life estate, for purposes of the Section 2013 credit, is to be ascertained by recognized valuation principles—which may, but need not necessarily, employ actuarial and mortality tables.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1971.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2013. CREDIT FOR TAX ON PRIOR TRANSFERS.

(a) *General Rule.*—The tax imposed by section 2001 shall be credited with all or a part of the amount of the Federal estate tax paid with respect to the transfer of property (including property passing as a result of the exercise or non-exercise of a power of appointment) to the decedent by or from a person (herein designated as a "transferor") who died within 10 years before, or within 2 years after, the decedent's death. If the transferor died within 2 years of the death of the decedent, the credit shall be the amount determined under subsections (b) and (c). * * *

* * * *

(d) *Valuation of Property Transferred.*—The value of property transferred to the decedent shall be the value used for the purpose of determining the Federal estate tax liability of the estate of the transferor * * *

* * * *

(e) *Property Defined.*—For purposes of this section, the term "property" includes any beneficial interest in property, including a general power of appointment (as defined in section 2041).

Treasury Regulations on Estate Tax (1954 Code) (26 C.F.R.):

Sec. 20.2013-4 *Valuation of property transferred.*

(a) For purposes of section 2013 and §§ 20.-2013-1 to 20.2013-6, the value of the property transferred to the decedent is the value at which such property was included in the transferor's gross estate for the purpose of the Federal estate tax (see sections 2031, 2032, and the regulations thereunder) reduced as indicated in paragraph (b) of this section. If the decedent received a life estate or remainder or other limited interest in property included in the transferor's gross estate, the value of the interest is determined as of the date of the transferor's death on the basis of recognized valuation principles (see especially § 20.2031-7). * * *

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